FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-404.

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal From the Supreme Court of the State of New Jersey.

REPLY BRIEF OF APPELLANTS.

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TABLE OF CONTENTS OF REPLY BRIEF.

	Page
ARGUMENT	2
The Arguments Presented by Appellees Do Not Justify the Statutory Prohibition Against Entry, Treatment and Disposal of Solid and Liquid Wastes Originating Outside of New Jersey	2
CONCLUSION	11

TABLE OF CITATIONS.

Cases: Page

Great A. & P. Tea Co. v. Cottrell, 424 *U. S.* 366 (1976) 2

Hackensack Meadowlands v. Mun. Landfill Auth., 68 *N. J.* 451 (1975) 6, 9

H. P. Hood & Sons, Inc. v. DuMond, 336 *U. S.* 525 (1949) .. 2

Hunt v. Washington Apple Advertising Comm'n, 432 *U. S.* 333 (1978) 2, 3, 9, 10

Raymond Motor Transportation, Inc. v. Rice, — *U. S.* — (1978), 46 *L. W.* 4109 (1978) 2, 3

Statutes:

United States

42 U. S. C. § 3251 5

42 U. S. C. § 6903(26) 4

42 U. S. C. § 6944 4

42 U. S. C. § 6944(a) 3, 4, 10

42 U. S. C. § 6945 3

42 U. S. C. § 6945(c) 3

New Jersey

N. J. S. A. 13:1E-2 7

N. J. S. A. 13:1E-6a(2) 8

N. J. S. A. 13:1E-6a(3) 8

P. L. 1973, c. 363 ..... 5, 6, 9, 10, 11

P. L. 1975, c. 326 7

Administrative Regulations:

New Jersey

N. J. A. C. 7:26-2.5 10

TABLE OF CITATIONS (Continued).

Other Authorities: Page

1965 U. S. Code, Cong. and Adm. News 5

1970 U. S. Code, Cong. and Adm. News 6

Garland, George A., and Mosher, Dale C., "Leachate Effects of Improper Land Disposal", *Waste Age*, March, 1975 .. 4

Gas and Leachate From Landfills: Formation, Collection and Treatment, Proceedings of a Research Symposium Held at Rutgers University, U. S. Environmental Protection Agency, March, 1976 4

Chian, Edward S. K. and DeWalle, Foppe B., "Analytical Methodologies for Leachate and Gas Analysis" 4

Materials Relating to the Resource Conservation and Recovery Act of 1976, Committee Print No. 20 (Comm. on Interstate and Foreign Commerce) 7

Miller, David, DeLuca, Frank and Tessier, Thomas, Ground Water Contamination in the Northeast States, U. S. Environmental Protection Agency, June, 1974 3

National Solid Wastes Management Association, New Jersey Chapter Bulletin, June, 1977 5

New Jersey Solid Waste Management Plan (Newark: Planners Associates, Inc., 1970) 9

Proceedings of the Waste Management Conference, Tri-State Regional Planning Commission, New York, 1973 9

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v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY AND RICHARD J. SULLIVAN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

REPLY BRIEF OF APPELLANTS.

ARGUMENT.

The Arguments Presented by Appellees Do Not Justify the Statutory Prohibition Against Entry, Treatment and Disposal of Solid and Liquid Wastes Originating Outside of New Jersey.

Less than two weeks ago, on February 21, 1978, a unanimous Supreme Court struck down certain regulations adopted by the Wisconsin State Highway Commission "because they place a substantial burden on interstate commerce and they cannot be said to make more than the most speculative contribution to highway safety." *Raymond Motor Transportation, Inc. v. Rice,* — *U. S.* — (1978), 46 *L. W.* 4109, 4114 (1978).

In arriving at its judgment, the Court made a "delicate adjustment of the conflicting state and federal claims", *H. P. Hood & Sons, Inc. v. DuMond,* 336 *U. S.* 525, 553 (1949) (Black, J., dissenting); *Great A. & P. Tea Co. v. Cottrell,* 424 *U. S.* 366, 371 (1976), by undertaking "a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce". *Raymond Motor Transportation, Inc. v. Rice,* — *U. S.* —, *supra,* 46 *L. W., supra,* at 4112.

As in *Raymond Motor,* Appellants here respectfully contend that *P.L.* 1973, *c.* 363 makes no more than the most speculative contribution to public health and environmental quality, while imposing a substantial burden on interstate commerce. However, a "delicate adjustment" between state and federal claims need not be made when Congress has acted to regulate interstate commerce or when state legislation discriminates against interstate commerce, *Hunt v. Washington Apple Advertising*

Comm'n., 432 *U. S.* 333, 350 (1977), *Raymond Motor Transportation, Inc. v. Rice,* — *U. S.* —, *supra,* 46 *L. W. supra,* at 4112.

In the case at bar, Congress has not remained silent. Rather, it decisively acted "To regulate Commerce . . . among the several States . . ." by unconditionally prohibiting the disposal of solid or hazardous waste in open dumps,[1] 42 *U. S. C.* § 6945(c).

The Administrator of the United States Environmental Protection Agency is directed to establish "criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps". The criteria must, *at a minimum,* "provide that a facility may be classified as a sanitary landfill and not an open dump only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility". 42 *U. S. C.* § 6944(a).

By virtue of the aforesaid Congressional action, neither solid waste nor hazardous waste can be disposed of in an open dump regardless of its place of collection or origin. The statute acts in an evenhanded manner to prevent disposal of all wastes in "unsanitary" facilities.

If the land disposal problems [2] identified by Appellees in their brief cannot be controlled to eliminate the "rea-

1. Appellees concede that each State is obligated to eliminate open dumping (Appellees Brief, p. 24, n. 2). A timetable to accomplish the Congressional directive is fixed by statute, 42 *U. S. C.* § 6945.

2. Appellees grossly distort the severity of the problems and entirely fail to address the viability of regulatory control. For example, in citing *Ground Water Contamination in the Northeast States,* U. S. Environmental Protection Agency, June 1974, Appellees convey the impression that ground water contamination is virtually inevitable. Yet, the authors of that study point out: "Each of the 11 states in the study region [including New Jersey] already appears to have legislation which, although general in nature, would allow regulations and policies to be formulated and enforced for

sonable probability of adverse effects on health or the environment", 42 *U. S. C.* § 6944(a), then existing facilities in New Jersey cannot be used to accommodate even the solid or hazardous waste collected in that State. If, on the other hand, a disposal site is a "sanitary landfill" as defined in the Resource Conservation and Recovery Act of 1976, 42 *U. S. C.* §§ 6903 (26), 6944, there is no reasonable justification for conditioning disposal upon point of origin.

Despite the inaccurate picture which they seek to convey, the most that Appellees have shown in their brief and their affidavits is that some facilities have not been designed or operated in an environmentally sound manner, and that problems may be encountered in connection with

2. (Cont'd.)
the prevention of ground-water quality degradation". *Ground Water Contamination*, at 307.

In "Leachate Effects of Improper Land Disposal", *Waste Age*, March, 1975, both the Deputy Director of the Systems Management Division of the Office of Solid Waste Management, United States Environmental Protection Agency and a soil scientist in said Agency bluntly state: ". . . *we know now that leachate does not have to be a problem in landfill operations.*

"Any land disposal practice which merits the name 'sanitary landfill' should be designed to prevent leachate pollution of surface water and ground water resources. . . . If the citizen and environmental groups who persist in opposing the location of new sanitary landfills fully understood the difference between a really properly designed and located sanitary landfill and those disposal operations which do not deserve to be called sanitary landfills, the difficulties commonly encountered in locating sanitary landfill sites would be dramatically reduced."

Appellees also cite *Gas and Leachate from Landfills: Formation, Collection and Treatment*, Proceedings of a Research Symposium held at Rutgers University, U. S. Environmental Protection Agency, March 1976. Interestingly, in "Analytical Methodologies for Leachate and Gas Analysis" contained in said volume, the authors pertinently comment: "The oldest method of solid waste disposal, that of landfilling, is still most widely used. This method can have an adverse effect on the environment unless sound engineering principles are used during design, operation and long term maintenance of the solid waste fill." at 105.

the land disposal of solid waste.[3] However, they inexplicably ignore the impact of the Rules of the Bureau of Solid Waste Management upon the problems which they identify. Said Rules, whose adoption was motivated by the "rapidly increasing generation of solid waste, the growing concern for depletion of our land resources, and increasingly sophisticated technology in solid waste management" (A149), are not even cited by Appellees in their brief.

The New Jersey Department of Environmental Protection has consistently recognized the environmental integrity of properly designed and operated land disposal facilities (Appellants' brief, pp. 8-9, 11-13, 17-18).[4] Sworn statements that such facilities adequately protect public health and environmental quality stand unrefuted in the record (A116, 181-182, 350, 353). That would not be the case if it was not true.

The New Jersey Statute, *P. L.* 1973, *c.* 363, and others like it, also create a significant adverse economic impact on interstate commerce. An estimated $3 billion was spent annually for solid waste collection and disposal in 1965 at the time of the adoption of the Solid Waste Disposal Act, 42 *U. S. C.* § 3251 *et seq.*, 1965 *U. S. Code, Cong. and Adm. News*, p. 3614. The cost of said service reached an esti-

3. Appellants do not disagree. Rather, they believe that the problems are adequately controlled by the adoption and enforcement of reasonable regulations.

4. During an interview conducted less than nine months ago, Beatrice Tylutki, Director, Solid Waste Administration, New Jersey Department of Environmental Protection, was quoted as saying: "Sanitary landfills can be operated in an environmentally acceptable manner . . . ." National Solid Wastes Management Association, New Jersey Chapter Bulletin, June, 1977. A copy of the Bulletin was filed with Mr. Justice Brennan on July 12, 1977, as part of the appendix in a Supplement to Application for Stay of Judgment, and judicial notice should be taken of same.

In a responsive affidavit appended to Appellees brief in opposition to the stay application, Ms. Tylutki commented about, but did not deny, the accuracy of the quotation attributed to her.

mated $4.5 billion by 1970, 1970 *U. S. Code, Cong. and Adm. News*, p. 4553. The House Report noted:

> "The greatest amount of the moneys spent goes for collecting solid waste and transporting it to some place where it may be dumped or burned."
>
> 1970 *U. S. Code, Cong. and Adm. News* p. 4553.

An identical conclusion was reached independently four years later by the Bureau of Solid Waste Management (A150) which noted: ". . . The collection and haulage of our solid waste accounts for 75 to 85 percent of the total collection/disposal costs . . . ."

Although the New Jersey Supreme Court erroneously held that *P. L.* 1973, *c.* 363 did not discriminate against interstate commerce in an economic sense, it recognized the obvious economic impact of its decision upon interstate commerce:

> "The City of Yonkers has access to the Croton dump in New York at a modest increase in cost of five dollars per ton. Philadelphia's stated alternatives are either to install adequate air pollution devices in their existing incinerators or to establish new landfill sites outside the city, which would require the purchase of additional disposal trucks."
>
> *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 N. J. 451, 476 (1975).

Appellant City of Philadelphia has averred that the cost of incineration facilities complying with federal and state air pollution standards would cost approximately $100,000,000 (A220). More recently, the Chief of the Bureau of Planning, Design and Resource Recovery in the Solid Waste Administration of the New Jersey Department

of Environmental Protection has estimated that if the City of Philadelphia utilized "Pennsylvania sites rather than New Jersey sanitary landfills for the disposal of its solid waste, . . . the average cost of collection and disposal would not increase by more than 10 per cent." (SA13). Since "[t]he cost for collecting and disposing of discarded materials ranks as the second largest expenditure of our nation's larger cities" [5], it is evident that prohibitory legislation can have a significant economic impact.

Despite the picture which Appellees attempt to convey, New Jersey is not overburdened or about to be consumed by waste disposal. In spite of Appellee's alleged "crisis", the State of New Jersey has never undertaken a survey to determine the amount of land available and suitable for operation of sanitary landfills (A184, 354).[6] The

5. *Materials Relating to the Resource Conservation and Recovery Act of 1976*, Committee Print No. 20 (Comm. on Interstate and Foreign Commerce), at 12.

6. In making comprehensive revisions to the Solid waste Management Act, *P. L.* 1975, *c.* 326, the New Jersey Legislature deleted its earlier "finding" that a solid waste crisis exists in the State, *N. J. S. A.* 13:1E-2. The legislature also directed the New Jersey Department of Environmental Protection to promulgate such regulations as may be necessary to protect public health and environmental quality:

> "The department shall . . . .
>
> • • •
>
> "(2) Formulate and promulgate, amend and repeal codes, rules and regulations concerning solid waste collection and solid waste disposal activities. Such codes, rules and regulations shall establish the procedures relating to the preparation and submission of environmental impact statements prior to the construction, acquisition, or operation of any solid waste facility, and shall establish standards for the construction and operation of solid waste facilities, which standards shall include, but not be limited to, provisions requiring: the maintenance of ground water quality monitoring wells to check water pollution; periodic monitoring of water quality by chemical analysis; measures to monitor methane gas production at sanitary landfills; plans for erosion control; revegetation procedures and plans for the maintenance, upkeep and reuse of

State, for its part, does not operate facilities for the disposal of municipal or industrial waste, but leaves that responsibility to industry. Sanitary landfills can only be situated on land as permitted by municipal zoning, and then only after detailed engineering plans have been reviewed and approved by the New Jersey Department of Environmental Protection.[7]

Sanitary landfilling is itself a method of recycling and resource recovery. Solid waste can be accepted for disposal at a sanitary landfill facility and used in a cost efficient and environmentally sound manner to recover severely mined or devastated lands and to produce gas for commercial purposes (A231-233).

Land recovered through sanitary landfilling is frequently devoted to public recreational use and green acres (A233, 355), "with little or no detriment to the environ-

6. (Cont'd.)

any sanitary landfill site; adequate cover material; safety measures; rodent, insect, bird, dust, fire and odor control programs; and such other measures as shall be deemed necessary to protect the public health and safety and the natural environment.

All codes, rules and regulations heretofore adopted by the Public Health Council relating to refuse disposal shall continue in full force and effect and be enforceable by the department, subject to its power as herein provided to amend or repeal the same."

N. J. S. A. 13:1E-6a(2)

The State Legislature has also directed, to the extent practicable, that solid waste management plans conform "to the provisions of any Federal law concerning . . . objectives, criteria and standards [for the evaluation of state solid waste management plans]." *N. J. S. A.* 13:1E-6a(3).

7. In the affidavit of Bernhardt V. Lind, Chief of the Bureau of Solid Waste Management within the Department of Environmental Protection of New Jersey (A163) he acknowledges: "The Department is required to deny registration to any facility which, in its opinion, will not meet the standards or criteria set forth in its solid waste regulations."

ment".[8] Indeed, the *New Jersey State Solid Waste Management Plan*, approved by the United States Environmental Protection Agency as the official State plan for New Jersey, frankly states:

> "It is not unusual for a properly designed and constructed sanitary landfill to become an asset to the local area."[9]

The record demonstrates overwhelmingly that there is no reasonable basis for the findings of the New Jersey Legislature or the Supreme Court of New Jersey. Regulatory control is entirely in the hands of federal and state government, and each has admitted, explicitly or implicitly, that solid waste can be disposed of in sanitary landfills with no reasonable probability of adverse effects upon health or the environment.

Furthermore, the New Jersey Statute, *P. L.* 1973, *c.* 363, is blatantly discriminatory. After finding clearly discriminatory a North Carolina statute which was "facially neutral", this Court went on to state:

> "When discrimination against commerce of the type we found here is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives, adequate to preserve the local interests at stake."
>
> *Hunt v. Washington Apple Advertising Comm'n.*, 432 *U. S. supra*, at 353.

8. Presentation by Grant Walton, Director, Division of Environmental Quality, New Jersey Department of Environmental Protection, published in *Proceedings of the Waste Management Conference*, "Partnership for Waste Management", Tri-State Regional Planning Commission, New York, 1973, p. 101.

9. *New Jersey Solid Waste Management Plan* (Newark: Planners Associates, Inc., 1970) p. 71. See *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra*, at 463.

The New Jersey Legislature in *P. L.* 1973, *c.* 363 made no effort to artfully disguise the discrimination; it is clearly stated. When the rule of *Hunt* is applied to New Jersey, the State has not met its burden to justify the discrimination either in terms of legitimate local benefits or unavailability of nondiscriminatory alternatives. Indeed, a justification has not even been attempted!

The only local benefit asserted by Appellees is that the discrimination imposed by the ban ". . . prolongs the useful life span of landfills within the state . . ." (A54). Upon analysis this is purely an economic benefit. Appellees have never contended that New Jersey regulations governing the operation of sanitary landfills are inadequate to protect the public health, or fail to meet the criteria for sanitary landfills demanded by the Resource Conservation and Recovery Act:

> "no reasonable probability of adverse effects on *health* or the *environment*."
>
> 42 *U. S. C.* § 6944(a) (emphasis added)

Rather, Appellees have diverted attention from the control effected by existing regulations for sanitary landfills, *N. J. A. C.* 7:26-2.5 *et seq.*, to the problems which these regulations are designed to correct.

CONCLUSION.

Based upon the aforesaid argument, and the arguments set forth in the Brief of Appellants heretofore filed with this Court, it is respectfully urged, in order of preference, and in the alternative, (1) That the judgment of the New Jersey Supreme Court be reversed and *P. L.* 1973, *c.* 363 be declared unconstitutional either on the ground that same directly burdens and discriminates against interstate commerce, or on the ground that same stands as an obstacle to the accomplishment of the full purposes and objectives of Congress in contravention of the Supremacy Clause; or (2) that the judgment of the New Jersey Supreme Court be reversed, and the matter remanded to the trial court for a hearing on the factual issues raised by the Commerce Clause questions, provided, however, that this Court retain jurisdiction and continue the stay of judgment heretofore granted pending a final determination of the matter by this Court on its merits.

Respectfully submitted,

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